

# USALSA Report

United States Army Legal Services Agency

## *Environmental Law Division Notes*

The Environmental Law Division (ELD), United States Army Legal Services Agency, produces the Environmental Law Division Bulletin, which is designed to inform Army environmental law practitioners about current developments in environmental law. The latest issue, volume 7, number 4, is reproduced in part below.

### **DOJ Decides No Supreme Court Review in EPA “Overfile” Case**

On 16 September 1999, a three-judge panel of the U.S. Court of Appeals for the Eighth Circuit ruled that the Resource Conservation and Recovery Act (RCRA)<sup>1</sup> does not give the Environmental Protection Agency (EPA) the authority to bring an enforcement action against a company that has already resolved an action over the same violations brought by an authorized state agency.<sup>2</sup>

On 24 January 2000, the EPA requested a re-hearing by the three-judge panel, and by the entire Eighth Circuit court. The court denied both requests. An appeal of the Eighth Circuit’s opinion was due to the Supreme Court on 24 April 2000. However, the Department of Justice (DOJ) declined to take the appeal to the Supreme Court on behalf of the EPA. Accordingly, the case is now formally closed. The EPA lacks legal authority to “overfile” environmental cases resolved with state agencies.

The plaintiff, Harmon Industries, was a manufacturer of safety equipment for the railroad industry. For fourteen years, Harmon’s employees threw used solvent residues out the back door of the plant. The discarded solvents were hazardous wastes under the RCRA.

In 1987, Harmon discovered what the employees were doing and ordered the practice to cease. Harmon then reported the disposal to the Missouri Department of Natural Resources (MDNR). The EPA had authorized the MDNR to administer its

own hazardous waste program under the RCRA. Since first being authorized to administer a program the EPA had never withdrawn the state’s authority.

After meeting with Harmon, the MDNR oversaw the investigation and cleanup of the Harmon facility. Ultimately, the state approved a post-closure permit for the facility, with costs of over \$500,000 over thirty years.<sup>3</sup> In 1991, the state filed a petition against Harmon in the state court, along with a consent decree signed by both Harmon and the MDNR. The court approved the consent decree that specifically provided that Harmon’s compliance with the decree constituted full satisfaction and release from all claims arising from allegations in the petition. The consent decree did not impose a monetary penalty.

Earlier, the EPA had notified the state of its view that fines should be assessed against Harmon. After the petition had been filed and approved by the state, the EPA filed an administrative complaint against Harmon seeking over two million dollars in penalties. An administrative law judge and the Environmental Appeals Board found for the EPA.<sup>4</sup> Harmon appealed to the federal district court on the issue of the authority of the EPA to take an enforcement action where the state had already entered into a consent decree.<sup>5</sup>

Harmon won the appeal to the federal district court.<sup>6</sup> According to the court, the RCRA does not give EPA authority to override the state once it determines an appropriate penalty. Section 3006(e) of RCRA gives the EPA only the option of withdrawing authorization of a state to administer a RCRA program. The EPA appealed the case to the Eighth Circuit. As noted above, the circuit court decided in favor of Harmon, and the DOJ has declined to take the case to the Supreme Court.

In light of this case, installation environmental law specialists should be aware of overfiling issues in all cases brought against an installation by the EPA. In almost all cases, installations will have some dealings with state regulators prior to receiving complaints from the EPA. In those cases which have resulted in the issuance of a state notice of violation, administrative order, or consent decree, the ability of the EPA to subsequently intervene and file an action on its own behalf has been

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1. 42 U.S.C.S. §§ 6901-6992K (LEXIS 2000).

2. *Harmon Indus., Inc. v. Browner*, 191 F.3d 894 (8th Cir. 1999).

3. *Id.* at 897.

4. *Harmon Indus., Inc. v. Browner*, 19 F. Supp. 2d 988, 989 (W.D. Mo. 1998).

5. *Id.* at 988.

6. *Harmon Indus., Inc.*, 191 F.3d at 894.

severely limited by the court decision. In such cases, the EPA must demonstrate that it has denied the authority of the state to administer the RCRA program. Further, such denial is not simply for the case at hand. Instead, it must deny the authority of the state to administer the entire program on all regulated entities. Such requirements will be a heavy burden for the EPA and it is likely that overfilings will be reduced in the future.

One final caveat should be noted. The EPA is currently appealing a similar overfiling case in the Tenth Circuit.<sup>7</sup> Should the case be decided in favor of the EPA, it will create a split of opinion in the circuit courts. It is possible that this split may prompt the DOJ to seek a resolution of the issue with the Supreme Court. Major Cotell.

### **Conservation Requirements under the Endangered Species Act**

Army Environmental Law Specialists (ELs) should note that the Army not only has an obligation to avoid actions which are likely to jeopardize listed species as required under Section 7(a)(2) of the Endangered Species Act (ESA), but also has a responsibility to carry out programs for the conservation of listed species under Section 7(a)(1) of the ESA.<sup>8</sup> In recent environmental litigation, plaintiffs have challenged the adequacy of agencies' conservation programs in addition to challenging the sufficiency of biological opinions.

Section 7(a)(1) establishes both substantive and procedural duties for the conservation of endangered and threatened species for federal agencies. As defined under the ESA, "conservation" means "to use . . . all methods and procedures which are necessary to bring any endangered or threatened species to the point at which the measures provided pursuant to the ESA are no longer necessary."<sup>9</sup> First, the substantive duties of Section 7(a)(1) require all federal agencies, including the Army, to carry out programs for the conservation of endangered and threatened species.<sup>10</sup> Second, the procedural duties of Section 7(a)(1) require the Army to consult with the U.S. Fish and Wildlife Service (FWS) on their conservation programs.<sup>11</sup>

Accordingly, Army ELs should insure that their installations are implementing conservation programs for listed species pursuant to the ESA. *Army Regulation 200-3, Natural Resources—Land, Forest, and Wildlife Management* (AR 200-3) provides guidance on how to implement the conservation requirements of the ESA. According to AR 200-3, "The key to successfully balancing mission requirements and the conservation of listed species is long-term planning and effective management to prevent conflicts between these competing interests."<sup>12</sup> Towards that end, AR 200-3 requires Army installations to prepare an Endangered Species Management Plan (ESMP) for listed and proposed species and critical habitat present on the installation.<sup>13</sup> Specific items that must be included and areas that must be covered in an ESMP are listed in AR 200-3. It is important to note that installation ESMPs will vary in length and detail depending on the complexity of management problems with the species and its habitat.<sup>14</sup> Therefore, at a minimum, each installation that has listed and proposed species and critical habitat on the installation must prepare an ESMP.

Army ELs should also encourage innovation in developing installation conservation programs. For example, installations may carry out their conservation duties through research assistance, logistical assistance, and the like. *Army Regulation 200-3* also includes a number of methods for meeting conservation obligations such as participation in recovery planning, support of the reintroduction of species.<sup>15</sup> Additionally, installations should examine incorporating conservation recommendations from Fish and Wildlife Service's biological opinions into their ESMPs or conservation programs although they are generally discretionary. Finally, because each installation is different and the types of endangered and threatened species and critical habitat present on installations are different, conservation programs will vary widely from post to post throughout the United States.

Next, Army ELs should insure that the consultation requirements of Section 7(a)(1) of the ESA have been met. The procedural task of "consulting" with FWS under Section 7(a)(1) is not the same as consultation under Section 7(a)(2). Section 7(a)(1) consultation can generally be accomplished by

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7. *United States v. Power Eng'g Co.*, 10 F. Supp. 2d 1145 (1998).

8. 15 U.S.C.S. § 1536(a)(1), (2) (LEXIS 2000); U.S. DEP'T OF ARMY, REG. 200-3, NATURAL RESOURCES—LAND, FOREST, AND WILDLIFE MANAGEMENT, para. 11-2a (28 Feb. 1995) [hereinafter AR 200-3].

9. 15 U.S.C.S. § 1532(3); 50 C.F.R. § 424.02(c) (1999).

10. 15 U.S.C.S. § 1536(a)(1).

11. *Id.* "All other federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authority in . . . by carrying out programs for the conservation of endangered species and threatened species . . . ." *Id.*

12. AR 200-3, *supra* note 8, para. 11-1a.

13. *Id.* para. 11-5a(1).

14. *Id.* para. 11-5(b)(4).

an exchange of letters between the installation and FWS. First, the Army installation should send a letter to the FWS detailing their conservation actions and asking the FWS for comments regarding those actions. In return, FWS may respond with comments or suggestions on the installation's conservation program. Depending on the sufficiency of the ESMP and conservation actions, FWS may concur that the installation's conservation program meets Section 7(a)(1) responsibilities. Once the installation receives a letter from FWS endorsing the Army installation's commitment to Section 7(a)(1) of the ESA, the procedural loop of "consultation" can be considered closed.

In conclusion, the Army has committed to being a national leader in conserving listed species.<sup>16</sup> This article lays out the basic steps installations must take to meet their conservation requirements under the ESA. Army ELSs should be working in conjunction with installation environmental offices to insure that Army commanders and units are meeting their mission

requirements in harmony with the ESA and its conservation requirements. Major Shields.

### NEPA in a Nutshell

Questions about the National Environmental Policy Act? See the Council for Environmental Quality's (CEQ's) NEPANet Website at <http://ceq.eh.doe.gov/nepa/nepanet.htm>.

This website's information includes the text of the statute, text of regulations, NEPA's Forty Most Asked Questions, CEQ annual reports, and more. The website also has CEQ publications on "hot topics" such as "Incorporating Biodiversity Considerations into NEPA Process" and "Considering Cumulative Effects under the National Environmental Policy Act." Major Shields.

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15. *Id.* para. 11-8.

The Army should actively participate in the development of recovery plans, whenever possible, to ensure that the FWS or New Mexico Forestry Service (NMFS) and the recovery teams appointed by the FWS or NMFS know and consider Army interests. For listed species present on Army installations, the Army should make a request to the FWS or NMFS to provide for Army representation on recovery teams.

*Id.* para. 11-14. "The Army will support the reintroduction of and introduction of federal and State listed, proposed, and candidate species on Army lands unless reintroduction/introduction will have a significant impact on the present or future ability of the Army to meet its mission requirements." *Id.*

16. *Id.* para. 11-1(a).